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NO. 85-1222 and NO. 85-1267

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

V.

STATE OF TEXAS,
Respondent.

AND

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

V.

STATE OF TEXAS
Respondent.

BRIEF OF THE STATE OF TEXAS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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BRIEF OF THE STATE OF TEXAS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

The Attorney General of Texas, on behalf of the State of Texas, files this Brief in Opposition to the Petitions for Writ of Certiorari of the Interstate Commerce Commission ("I.C.C."). and Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, and Southern Pacific Transportation Company (collectively "the Railroads").

STATEMENT

The State of Texas sought a review of orders from the I.C.C. issued under 49 U.S.C. §10505. The order exempted intrastate

intermodal transportation of trailer on flat car and container on flat car (collectively TOFC/COFC) traffic from state and federal regulation. The Fifth Circuit Court of Appeals properly determined that the I.C.C. had exceeded its jurisdiction and could not preempt state regulation of purely intrastate motor carrier transportation.

REASONS FOR DENIAL OF THE PETITION

The I.C.C. lacks jurisdiction over purely intrastate motor carrier traffic. Given no jurisdiction, the I.C.C. has no power to exempt intrastate motor carrier transportation from state regulation.

The general jurisdiction of the I.C.C. over rail transportation is outlined in 49 U.S.C. §10501. The statute expressly qualifies the jurisdiction of the I.C.C. on two factors. First, Section 10501(a)(1)(A) gives the "Commission jurisdiction over transportation (1) by rail carrier ... that is (A) only by railroad." Secondly, Section 10501(a)(1)(B) makes it clear that jurisdiction extends only to interstate transportation.

Specific reference to the jurisdiction of the I.C.C. over motor carrier transportation, 49 U.S.C. §10521, expressly dictates that I.C.C. jurisdiction involves interstate traffic and does not "affect the power of the state to regulate intrastate transportation provided by motor carrier".

1. No Conflict Between Circuits Exists.

The decision in *Illinois Commerce Commission v. I.C.C.*, 749 F.2d 875 (D.C. Cir. 1984) is not in conflict with the case at bar as asserted by the Railroads and the I.C.C. In *Illinois*, the court held that the I.C.C.'s exemptions pursuant to the Staggers Act were standards applicable to the states. The *Illinois* court did *not* hold that the I.C.C.'s exemption power extends to matters over which the I.C.C. has no jurisdiction. Specifically, the *Illinois* court did not hold that the I.C.C. could exempt intrastate motor carriage in connection with intrastate, intermodal TOFC/COFC transportation.

In the present case, the Fifth Circuit does not address the "exemption v. standard" dispute upon which the District of Columbia Circuit held. Resolution of those issues is not necessary to the Fifth Circuit's conclusion. The Fifth Circuit, properly, ruled upon the purely jurisdictional question. Given the heated controversy on the exemption/standard dispute in the District of Columbia Circuit (*See, Illinois,* dissenting opinion, 749 F.2d at pp. 887-893), it should not be assumed, as Petitioners apparently assert, that the Fifth Circuit ruled on this issue in passing.

The Fifth Circuit appropriately distinguished *American Trucking Ass'ns v. Interstate Commerce Commission,* 656 F.2d 1115 (5th Cir. 1981). That case involved interstate rail carrier traffic and interstate motor carrier traffic. The I.C.C. has clear jurisdiction over interstate rail carrier and interstate motor carrier traffic. The Fifth Circuit, in this case, recognized, however, that given a situation involving intrastate motor carrier transportation, in conjunction with intrastate rail transportation, the I.C.C. has no jurisdiction over the intrastate motor carriage.

In reaching its decision in the case at bar the Fifth Circuit evaluated the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, and the Staggers Rail Act and concluded that there is no clear intent, by Congress, to prohibit the states from regulating motor carriers that operate totally intrastate. On the contrary, amendments to 49 U.S.C. §10521(b)(1), as recently as 1982, establish exceptions to the power of the states over intrastate motor carrier transportation. Of these exceptions, none involve intrastate trucking in connection with intrastate rail transportation. As stated by the Fifth Circuit, "If Congress had intended to change the power of the states to regulate that activity, it could, and presumptively would, have added a fourth exception to the power of the states to regulate intrastate transportation by motor carrier." The State of Texas asserts that there is not conflict between Circuits which requires a determination by this Court.

2. No Conflict With This Court's Decisions Exists.

In addition, the Fifth Circuit's opinion here is not in conflict with decisions of this Court as contended by the I.C.C. In neither *Thomson v. United States*, 321 U.S. 19 (1944), nor *American Trucking Ass'ns v. A.T. & S.F. Ry. Co.*, 387 U.S. 397 (1967) did this Court hold that the I.C.C. could act outside its statutory jurisdiction to exempt intrastate motor carrier traffic. The I.C.C.'s assertion that this Court held in *Thomson* that "a railroad may use trucks as part of a 'single complete freight transportation service to and from all points on its lines' without becoming a motor common carrier within the meaning of the Interstate Commerce Act," (I.C.C. Petition, p. 13) is simply incorrect. In *Thomson*, this Court stated:

> Even more clearly, under the amended definition, the railroad is holding itself out to the general public to engage in the transportation of freight by motor vehicle as part of its coordinated rail-motor freight service. *In short, it is a common carrier by motor vehicle within the meaning of the Act.* 321 U.S. at p. 25. [Emphasis added].

The Court went on to hold the railroad "... entitled to common carrier 'grandfather' rights as to the motor vehicle service ..." *Id.*

3. The RCT's Certification is Immaterial.

That the Railroad Commission of Texas ("RCT") is not certified to regulate rail traffic, pursuant to 49 U.S.C. 11501, is of no consequence to the result reached by the Fifth Circuit in this case. The RCT, in this proceeding, has never asserted jurisdiction over the rail portion of the TOFC/COFC movements. The Fifth Circuit's opinion does not empower the RCT to make such an assertion. It is the intrastate motor carriage which the State seeks to continue regulating and over which the I.C.C. has no statutory authority.

CONCLUSION

The State of Texas prays that the Petition for Writ of Certiorari be denied.

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